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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-434

LOUISIANA MATERIALS CO., INC.,
Petitioners,

versus

ALWYNN J. CRONVICH, SHERIFF OF THE PARISH OF JEFFERSON, ET AL,
Respondents.

RESPONSIVE BRIEF ON BEHALF OF DEFENDANTS-APPELLEES

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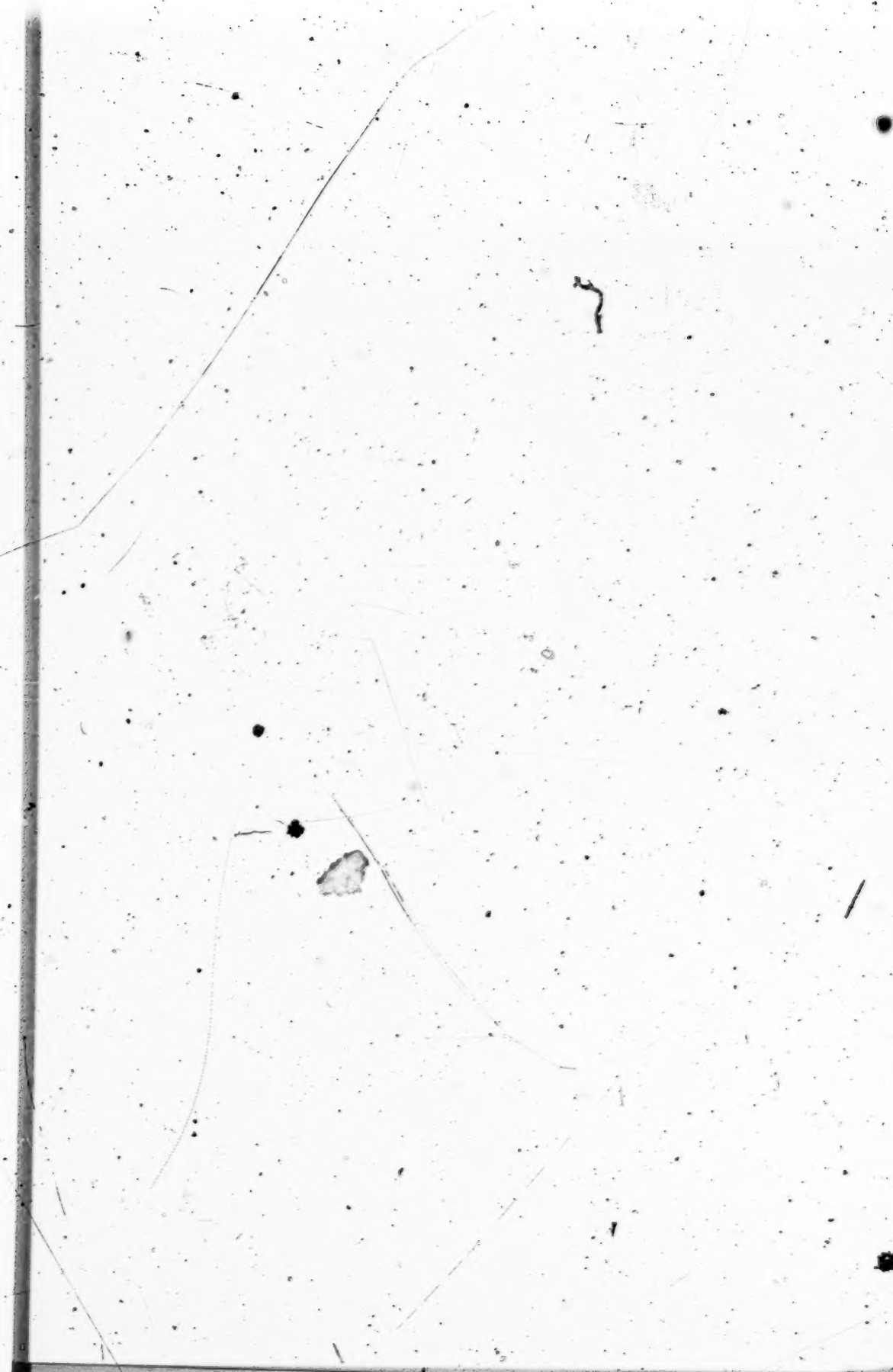

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SYLLABUS

Constitutional Law:

1. Due Process — Procedure.

Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. *Goldberg v. Kelly*, 397 US 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970).

2. Due Process — Termination of Welfare Payments — Hearing.

The evidentiary hearing required by due process to be afforded a recipient of public assistance benefits before the termination of such benefits need not take the form of a judicial or quasi-judicial trial, and a complete record and a comprehensive opinion need not be provided at the pretermination stage; such hearing may be limited to minimum procedural safeguards adapted to the particular characteristics of welfare recipients and to the limited nature of the controversies to be resolved, and no procedural requirements beyond those demanded by rudimentary due process should be imposed upon the states or the Federal Government. *Goldberg v. Kelly*, 397 US 254, 25 L.Ed.2d 287, 90 S. Ct. 1011.

3. Due Process — Opportunity to be Heard.

Under due process principles, the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. *Goldberg v. Kelly*, 397 US 254, 25 L.Ed.2d 287, 90 S.Ct. 1011.

4. Where landowners applying for permit to dredge and fill in navigable waters were given hearing before Corps of Engineers, the body empowered to grant or deny a permit, and were allowed to rebut findings and conclusions of Fish and Wildlife Service before the deciding body, denial of permit without hearing before Fish and Wildlife Service did not constitute deprivation of property without due process of law. Fish and Wildlife Coordination Act, Secs. 1, 2, 16 U.S.C.A. Secs. 661, 662; Rivers and Harbors Appropriation Act of 1899, Secs. 10, 33 U.S.C.A. Sec. 403. *Zabel v. Tabb*, 430 F.2d 199 (1970).

5. Minimum procedural safeguards required by due process in each situation depend on nature of governmental function involved and substance of private interest which is affected by the governmental action. *Escalera v. New York City Housing Authority*, 425 F.2d 853 (1970).

6. A suit for injunction to restrain interference with possession of realty was required to be dismissed for plaintiff's failure and apparent inability to prove possession of realty for a period of one year or more next preceding the institution of the suit. Code of Practice Article 298. *Bonnabel v. Police Jury for Parish of Jefferson*, 3 So.2d 183.

7. Article 3658 of the Louisiana Code of Civil Procedure provides:

> "To maintain the possessory action the possessor must allege and prove that:
>
> "(1) He had possession of the immovable property or real right at the time the disturbance occurred;
>
> "(2) He and his ancestors in title had such possession quietly and without interruption for more than a year immediately prior to the disturbance, unless evicted by force or fraud;
>
> "(3) The disturbance was one in fact or in law, as defined in Article 3659; and

"(4) The possessory action was instituted within a year of the disturbance."

MAY IT PLEASE THE COURT:

Lake Pontchartrain is an arm of the sea bordering on the boundaries of the City of New Orleans and Jefferson, St. Charles and St. Tammany Parishes. In the Parish of Jefferson, 215,000 residents are protected from inundation from the waters of Lake Pontchartrain by levees, a self-made mound of mud approximately 30 feet above water level.

The Parish of Jefferson is a suburb of the City of New Orleans and one of the fastest growing parishes in the United States, its population doubling every ten years. On the East Bank of Jefferson Parish, the parish being divided by the Mississippi River into the East Bank and West Bank, is the area in issue and includes a densely populated single-family residential district, known as Lake Villa Subdivision.

Some ten years ago, when the East Bank of Jefferson was sparsely populated, Louisiana Materials Company sought and obtained permission to operate a shell and gravel business over the levee in Lake Pontchartrain at the intersection of Lake Villa Drive and Suburban Outfall Canal.

The Company initially obtained a right of way agreement, a servitude in civil law, or an easement in common law, to allow representatives of Louisiana Materials and its customers to cross over the levee to

pick up sand and gravel which were deposited on an area between the shore of Lake Pontchartrain and the levee. Additionally, Louisiana Materials sought a lease from the Jefferson Parish Council, the governing authority of the Parish of Jefferson, for an initial period of five years, which was subsequently extended on a year to year basis.

From approximately 1966, Louisiana Materials was experiencing difficulty in obtaining extensions of its lease with the Parish of Jefferson for two-fold reason:

1. The Parish had numerous complaints from its Department Heads that the operation of Louisiana Materials at the Suburban Outfall Canal was particularly dangerous to the safety of the inhabitants of the East Bank during the hurricane season; also as shells from the barges would fall into the Canal and interfere with the drainage process of a large portion of the East Bank.

2. The area surrounding the plant had developed as a prime residential area and the noise, dust and unusually heavy trucks interfered with the peace and quiet of the residential area.

Finally in 1969, the Jefferson Parish Council refused to extend the lease for an additional period, however, it did grant Louisiana Materials an extension to operate from February 28, 1969 to February 28, 1970, without a lease, predicated upon Louisiana Materials Company's ceasing operation at the end of the extension, February 28, 1970. Additionally, in February 1969,

Resolution No. 14113 of the Jefferson Parish Council was adopted requesting the Administrative Agencies of the Parish of Jefferson to request Louisiana Materials to remove its yard and to assist the Company in obtaining another location.

The record will reflect a letter from the Parish Attorney for the Parish of Jefferson, dated some 60 days before the termination of the agreement advising Louisiana Materials that the time for the extension of the operation tendered by the Parish of Jefferson was about to terminate and requested that they remove all their equipment and cease their operation on or before February 28, 1970.

On March 1st, 1970, the Jefferson Parish Department of Roads & Bridges constructed a barricade of concrete posts at the end of Lake Villa Drive and the toe of the Lake Pontchartrain levee closing for all practical purposes vehicle traffic crossing the levee at Lake Villa Drive.

It is important to point out that on the East Bank of Jefferson Parish, *all streets are barricaded* at the end of the street and the toe of the levee of Lake Pontchartrain, the one exception being Williams Boulevard, where there is situated a boat launching site and vehicles cross the levee for the purpose of launching boats.

The levee is primarily built for flood protecting from the shallow waters of Lake Pontchartrain which are often whipped up by high winds particularly during

hurricane season. The levee is closed to all vehicular traffic and is patroled by Levee Board and Parish Police to prevent the use of the levee for other than lawful purposes. Although no formal hearing was held before the erection of the barricade, there were numerous private and public conferences held between the representatives of Louisiana Materials and the Parish of Jefferson, Pontchartrain Levee Board and various Civic Associations interested in the operation of Louisiana Materials. It must be remembered that although the original lease and renewals were in existence approximately nine years and the last extension without a lease was granted to Louisiana Materials from February 28, 1969 through February 28, 1970, it was only that at this time Louisiana Materials Company reversed its position and stated it no longer needed permission or a lease from the Parish of Jefferson to maintain its operation across the levee of Lake Pontchartrain and Lake Villa Drive.

In early March, Louisiana Materials instituted a Possessory Action requesting an injunction against the Parish of Jefferson from interfering with the shell operation of the Company at its Lake Villa site. A Possessory Action under Louisiana Civil law, C. Code 3658 is one instituted by the owner of the property or one having a "real right in the property alleging it has been the owner of this property for more than one year and is being disturbed in its possession. One of the requirements to successfully institute this suit is that you possess this property as its owner or of a real right as defined by Louisiana law.

Plaintiff had always claimed it had the use of said property by the grant of a right of way from the Pontchartrain Levee District dated April 9, 1965 and the lease and extension of lease granted by the Parish of Jefferson.

The ownership of levees as such has never been judicially determined under Louisiana law. The levees are built under the direction of the Corps of Engineers, maintained by Levee Districts, supported by Louisiana taxpayers and afforded police protection by special Levee Board and Parish Police personnel, even though land such as that adjoining Lake Pontchartrain may be appropriated for Levee purposes and a levee may be constructed on the land, the ownership of the land under the levee remains that of the individual owner who owned the land at the time of the appropriation. Even though Louisiana Materials claimed that they possessed the land as an owner, several days after the institution of this suit, they sought to purchase the ground underneath the levee from various individuals who owned the property at the time the levee was erected.

On the trial for preliminary injunction, the injunction was refused by the Trial Court and Louisiana Materials took an appeal to our intermediate Court of Appeal, designated as the Fourth Circuit, situated in New Orleans, Louisiana, and the case was reversed and an injunction was granted. The Parish of Jefferson sought a review of this decision by the Louisiana Supreme Court by writs of certiorari, which were granted and the judgment of the Fourth Circuit Court

of Appeals was reversed and that of the Trial Court reinstated. Copies of all rulings are attached to Relators application for a writ of certiorari to this Honorable Court.

The Constitutional questions presented are:

(1) Whether, on March 1, 1970, when the Parish of Jefferson erected the barricade on its street prohibiting vehicular traffic from crossing the levee at Lake Villa Drive, Louisiana Materials afforded procedural due process.

(2) Does Louisiana Materials meet the requirements of Article 3658 of the Louisiana Civil Code needed to bring a possessory action under Louisiana law?

The answer would appear to be that they were afforded procedural due process.

We may begin by asking ourselves the question of whether the Parish of Jefferson's governmental function involved out-weighs the private interest of Louisiana Materials Company in continuing to do business on the levee at Lake Villa Drive in Jefferson Parish. The record is replete with evidence that the Parish of Jefferson had many governmental concerns in the operation of Louisiana Materials Plant. Louisiana Materials was extended a privilege as early as 1961 to operate the only commercial or industrial business on the entire eighteen miles of levee bordering Lake Pontchartrain.

This privilege was granted when the surrounding area was sparsley populated. This privilege was granted despite the fact that the entire area adjacent to the Lake was zoned solely for residential development.

This privilege was extended from time to tme despite the fact that trucks hauling from the shell site when loaded, were breaking the load limit law and the streets.

This privilege was extended despite the fact that there were numerous complaints from Administrative Departments of the Parish of Jefferson about the operation of this plant, particularly the threat of a barge ramming the grille of the Pumping Station, thereby causing the entire East Bank of Jefferson to be inundated.

This privilege was extended despite the fact that the Administrative Department complained that in the unloading process, shells from the barges fell into the outfall of Suburban Canal and interfered with normal drainage operation.

This privilege was extended despite the numerous complaint of residents of the area of the noise, traffic and dust caused by this privileged operation.

It was in February of 1969 that the Jefferson Parish Council advised Louisiana Materials, at a hearing that it could no longer tolerate the operation of Louisiana Materials or extend the privilege to allow them to operate in this residential area.

Sixty days before the termination of the extension period by Louisiana Materials was allowed to operate, the Jefferson Parish Council caused notice to be sent by the Parish of Jefferson requesting and advising Louisiana Materials to cease its operation and outlining the consequences if it did not cease its operation. The Jefferson Parish Council, as governing authority of the Parish, holds public hearings weekly at which representatives from Louisiana Materials Company could always make an appearance. However, it chose not to do so and completely reversed its position and stated that it no longer needed a lease from the Parish of Jefferson to conduct its operation at this site.

This is an abuse of a privilege extended by the political process. For some ten years, the last five on an annual basis, representatives of Louisiana Materials sought and obtained a lease from the Parish of Jefferson to conduct this operation and it was only after the Parish had granted it an additional year without a lease in order to allow Louisiana Materials to seek another site or to combine its operations with its other yards, that Louisiana Materials completely changed its position and claimed it possessed the land for a period of more than one year prior to institution of this litigation, and was entitled to remain at the site without the permission of the Parish of Jefferson.

It is important to point out that the servitude or right of passage granted by the Pontchartrain Levee District is predicated upon the approval of federal, state and parish governments and is so stated in the right of way agreement. It bears repetition that every other roadway, street or boulevard on the East Bank of Jef-

ferson Parish at the toe of the levee of Lake Pontchartrain is barricaded to vehicular traffic and constantly patroled by the various police forces to prohibit any unlawful activity.

It is of interest that immediately after filing this possessory action, Louisiana Materials sought to acquire the land under the levee from prior owners by quitclaims and is an admission that it did not possess the land as owner for a period of more than a year as required by Article 3658 of the Louisiana Civil Code.

Additionally, a large portion of the tract it occupies consists of an old, abandoned Louisiana road (Hammond Highway), which ran parallel to Lake Pontchartrain. Although the highway is abandoned, the land still belongs to the State of Louisiana and is insusceptible to private ownership by a company such as Louisiana Materials Company.

It is felt that Louisiana Materials was afforded procedural due process. It was afforded a hearing when it was granted the privilege of an extension for one additional year without a lease. It was forewarned sixty days in advance that the extended period for its operation would terminate on February 28, 1970. Representatives of Louisiana Materials attended numerous hearings airing the complaints of residents both before the Jefferson Parish Council and the monthly meetings of the Pontchartrain Levee District. It did not take advantage of public hearings held weekly by the Jefferson Parish Council in which every citizen is allowed the right to address its local government on any matter of concern.

The private interest of Louisiana Materials is not substantially affected by the closing of this Plant for it has two or three other locations where its customers may obtain shells, sand and gravel.

The closing of this Plant had removed the violation of the Jefferson Parish Zoning Ordinance and, the continuous violation of the street load limit law. It has removed the danger of a barge ramming the pumping station and has avoided the traffic, noise and dust which results from an operation of this nature. It has returned the location to a placid residential development, all of which was a serious concern to the governing authority of the Parish of Jefferson.

It is respectfully submitted that the notice and hearings afforded Louisiana Materials Company meet the standards of procedural due process required in *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011; *Escalera v. New York City Housing Authority*, 425 F.2d 853 (1970); and *Zabel v. Tabb*, 430 F.2d 199 (1970).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James O. Manning, a member of the bar of the United States Supreme Court, certify that at least one copy of the foregoing Responsive Brief has been served on the adverse party by depositing same in a United States Mail Box, with first class postage prepaid, addressed to counsel's last known address in New Orleans, Louisiana:

Mr. Neal D. Hobson
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1122 Whitney Building
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Gretna, Louisiana, this ____ day of January, 1972.

_____
James O. Manning
Assistant Parish Attorney